Filed 8/19/04 In re Kevin M. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re KEVIN M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. KEVIN M., Defendant and Appellant.	A105813 (Solano County Super. Ct. No. J33673)

Appellant Kevin M. appeals an order of the Juvenile Court of the County of Solano ordering him to spend 120 days in county jail and placing him on probation. We affirm.

PROCEDURAL BACKGROUND

On April 11, 2003, a petition pursuant to Welfare and Institutions Code section 602 filed in the Juvenile Court of Solano County charged appellant with the felony of recklessly causing a fire by setting fire to a structure located at Rio Vista High School. (Pen. Code, § 452, subd. (c)). Appellant admitted the allegation and was referred to the probation department for the deferred entry of judgment program. Subsequently, an amended petition filed October 23, 2003, charged appellant with two additional felony counts: count 2, forcible rape (Pen. Code, § 261, subd. (a)(2)); and count 3, attempted sodomy by use of force. (Pen. Code, §§ 664 and 286, subd. (c)(2).)

Following a contested hearing on December 22, 2003, the trial court sustained the allegations of these two additional counts.

In an order entered January 13, 2004, the court deemed the three counts to be felonies, placed appellant on probation, and committed him to the Solano County Jail for 120 days, with total credits of 79 days. Among other things, the order also adjudicated appellant a ward of the court, suspended a commitment to the California Youth Authority for a maximum of nine years and eight months, and terminated his participation in the deferred entry of judgment program. Appellant filed a timely notice of appeal. The sole assignment of error raised in his briefs relates to the contested hearing on counts 2 and 3.

FACTUAL BACKGROUND

The record, viewed in a light most favorable to the prosecution, reveals that appellant and the victim, S.J., were both 16 years old at the time of the incident at issue. They lived in the same neighborhood and shared several friends. At the contested hearing, S. testified that she regarded appellant as "one of her best friends" and they had a boyfriend-girlfriend relationship for "about six hours" in December 2001 when they kissed. On the evening of April 8, 2002, she exchanged messages with appellant through the instant message function of their computers. Appellant said that he was going to go to a church located in the neighborhood to commit suicide and S. could go the church to stop him if she wanted to. He said he felt miserable because he was still a virgin and asked S. to have sex with him if she was really his friend. At one point in the exchange, S. wrote: "You're actually the only guy I ever wanted to fuck." But she insisted that she did not want to have sex with him.

S. testified that she went to the church sometime after midnight and found appellant there with a blanket. Appellant said he had taken most of a bottle of pills and needed to take only six more pills in order to die. He then started to breath heavily. Appellant repeatedly told S. that all she had to do was to have sex with him and he would not commit suicide. Finally agreeing to the proposal, S. lay down, closed her eyes, and allowed appellant to take off her pajama pants and her shorts. After her shorts were removed, S. changed her mind and said, "I can't do this." Ignoring her objection,

appellant got on top of her and held her down. She could feel appellant's penis penetrate her vagina "a little ways." She succeeded in turning over and tried to crawl away. Appellant said, "Fine. I'll put it in the other way." She felt appellant's hard penis near her buttocks, but she succeeded in fighting him off. Pulling up her pants, she ran home.

Officer Vicki Rister of the Rio Vista Police Department interviewed S. a week after the incident and on two subsequent occasions. In the first two interviews, she told Officer Rister that appellant attacked her and she fought him off. In the third interview in October 2003, she gave an account of the incident consistent with her trial testimony. Officer Rister interviewed appellant after her first and third interviews with the victim. He gave a series of accounts that progressively retreated from complete denial to partial admission. He ultimately said that he had inserted his penis in the victim's vagina. The victim then said "no" and he held her for a few moments before letting her go.

The defense sought to impeach the prosecuting witness by presenting the testimony of seven witness with whom S. had confided accounts of the incident that varied from her trial testimony. Two other witnesses offered general comments about appellant's conduct. In rebuttal, the prosecution presented the testimony of one of the victim's friends who reported that the victim gave her an account of the incident that corresponded more closely to her trial testimony. The victim's father stated that he confronted appellant in the company of his parents and appellant admitted that he had tricked the victim into going to the church by faking suicide and then tried to take her clothes off.

On this evidence, the juvenile court sustained the two felony counts of forcible rape and attempted sodomy.

DISCUSSION

Appellant advances a single assignment of error in this appeal based on a claim of ineffective assistance of counsel. While conceding that the court properly excluded evidence of the victim's prior sexual conduct in rulings on pre-trial motions in limine, he claims that certain evidence relating to a strip poker game later became admissible for purpose of impeachment when the victim testified to her sexual inexperience.

On the morning of trial, defense counsel represented to the court that a designated witness would testified that, "just prior to this incident," S. participated in a strip poker game with several boys at the residence of one of the boys. The group decided to do an "all-or-nothing" hand of poker. She then threw her cards in, stripped off her clothes, straddled one of the boys, and said, "Fuck me, fuck me." The trial court ruled that the evidence would not be admissible because "we don't put victims on trial in sexual assault cases . . . [and] the defense would be putting on character evidence of the victim which is not allowed."

Later, the prosecution asked S. the following series of questions: "Q. Prior to April 2002, had you ever gone on a date with Kevin? A. [S.] Not technically. Q. Had you ever had a relationship that you would characterize as boyfriend and girlfriend? A. Yes. Q. How long did that last? A. About six hours. Q. And when was that? A. Like Christmas vacation. Q. Of 2001? A. Yeah. Q. Had you ever kissed? A. Yes. Q. Had you ever had sex with Kevin prior to April of 2002? A. No."

Evidence Code section 1103, subdivision (c), precludes admission of evidence of the victim's past sexual conduct for purpose of proving consent in a sexual assault case. (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707; *People v. Blackburn* (1976) 56 Cal.App.3d 685, 690.) The statute provides that, in a prosecution for enumerated sexual assault charges, "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, . . . is not admissible by the defendant in order to prove consent by the complaining witness."

A further subdivision of section 1103 provides that the statute does not bar evidence of sexual conduct to attack credibility. (*People v. King* (1979) 94 Cal.App.3d 696, 703.) Subdivision (c)(4) provides: "If the prosecutor introduces evidence, . . . or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may . . . offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness."

However, Evidence Code section 782, enacted at the same time as section 1103, subdivision (c), "imposes a procedural limitation upon the admissibility of evidence of sexual conduct of the alleged victim of certain sex offenses to attack the victim's credibility. Section 782 requires that the testimony be preceded by a written motion by the defendant accompanied by an affidavit containing an offer of proof. If the trial court finds that the offer of proof is 'sufficient,' it must conduct a '(a)(3) . . . hearing out of the presence of the jury, if any,' and allow the alleged victim to be questioned 'regarding the offer of proof . . . . [¶] (4) At the conclusion of the hearing, . . . the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted.' " (*People v. Jordan* (1983) 142 Cal.App.3d 628, 632, fn. omitted; see also *People v. Chandler, supra,* 56 Cal.App.4th 703, 707-708; *People v. Sims* (1976) 64 Cal.App.3d 544, 553-554.) In *People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919, the court admonishes that "[g]reat care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence."

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failing." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; *In re Wilson* (1992) 3 Cal.4th 945, 950.) "In assessing the adequacy of counsel's performance, a court must indulge 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citations.]' [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 988.)

In the present case, defense counsel cannot be faulted for failing to offer the evidence of the strip poker game for purpose of impeachment because the victim did not testify concerning her prior sexual conduct with others nor was it placed in issue. In the

testimony at issue, the victim testified to her previous relationship with *appellant*. Her testimony thus opened the door to testimony only on this factual inquiry and did not raise the broader issue of appellant's sexual inexperience. Appellant invites us to read a single question out of context. He argues that the prosecutor posed a general and "open-ended" question by asking if the victim "ever had a relationship that she would characterize as boyfriend and girlfriend." This question, however, must be read in the context of the questions that preceded and followed it. The prosecution was plainly pursuing a line of inquiry pertaining only to the witness's relationship with appellant.

In short, the prosecution did not inject the issue of the victim's sexual conduct into the trial but only the issue of her previous relationship with appellant. Since the evidence in question had no bearing on the victim's relationship with appellant, it was not relevant for purpose of impeachment. Defense counsel cannot be charged with deficient performance by failing to renew an offer to present evidence that was properly excluded before trial and remained inadmissible as impeachment evidence. (See *People v. Jordan, supra,* 142 Cal.App.3d 628, 632; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 340, p. 423.)

In view of our conclusion that the disputed evidence remained inadmissible, we do not reach the issues raised in appellant's brief regarding the prejudicial effect of defense counsel's failure to offer the evidence or the constitutionality of Evidence Code section 782.

The judgment is affirmed.

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Swager, J.

We concur:

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Stein, Acting P. J.

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Margulies, J.